IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION
CRIMINAL APPEAL NO.217 OF 2000

Shiva Karam Payaswami Tewar.. Appellant
(Orig. Accused)

Versus

The State of Maharashtra .. Respondent
(Orig. Complainant)

Appointed Advocate Smt. Latika Khemani for Appellant
APP Mrs. Bhosale for the Respondent

CORAM : S.B. MHASE
AND S.R. SATHE,JJ.
DATED : 25th August 2005

ORAL JUDGEMENT :- (PER S.R. SATHE,J.)

1. The Appellant-original accused in Sessions Case NO.1497 of 1995 has preferred this appeal against the judgment and order passed by the Court of Additional Sessions Judge, Greater Bombay whereby the accused was convicted for the offenses punishable under Sections 302, 321 and 201 of IPC and was sentenced to suffer r/i for life, r/i for 9 months and r/i for other 9 months respectively and to pay fine of Rs.5,000/- Rs.3,000/- and Rs.3,000/- respectively.

2. Brief facts giving rise to this appeal are as under :

. The accused Shiva Karam Payaswami Tewar was working in hotel Premier conducted by the complainant

Anthony Xavier at Dharavi, Mumbai-70. The accused was entrusted with the work of preparation of spices. The deceased Muttukumar was working as a manger in the said hotel. Considering the nature of their work the accused as well as Muttukumar used to stay over night in the hotel.

3. On 31-8-1995 in the evening afternoon complainant Anthony Xevier went to the hotel Premier and after usual supervision and talk with manager at night he returned. At that time the accused as well as Muttukumar were in the hotel. On the next day morning i.e. On 1-9-1995 one Murugan Shetiya working in the hotel went to PW 1 Anthony and told him that the hotel is open and Muttukumar and accused are not present in the hotel. He also informed that cash drawer was open and tape recorder was found missing. Naturally, complainant Anthony immediately went to the hotel. When he was making query Arun Pujari, who was conducting Pan bidi shop near the hotel and taxi driver Suresh Kumman who often used to park his tax near the hotel told him that accused met them at about 5-30 a.m. And he made enquiry about the bus going to Banglore. When complainant took survey of the hotel he found that cash box was open and tape recorder which was kept in the

hotel was missing. There was no cash in the cash box. According to him on the previous night the manager i.e. Deceased had informed him that on that day amount of Rs.3500/- was collected and the same was kept with him. At that time one waiter Verna Hariman told him that dead body of Muttukumar is lying in the gutter at the passage between hotel and kitchen. The complainant also found that body of Muttukumar was lying and there were injuries on his person. When he removed the body from gutter he found him dead. In view of the earlier information given by Suresh, the complainant with Arun went near Rupam theatre and they noticed that accused was near the office of travel agent and he was carrying with one suit case and Rexene bag. When accused saw the complainant proceeding towards him he ran away from the said place. However, complainant chased him and brought him to the hotel. According to the complainant when he made enquiry with the accused he told him that in the early morning he had a quarrel with Muttukumar and then he assaulted him with wooden log used for cutting onions and as a result of the same Muttukumar died. He also told him that he then cleaned the place with bed-sheet and threw the body in gutter. The complainant immediately informed Dharavi Police Station and Police arrived at the place. The complainant narrated the

entire incident and Police recorded his complaint.

4. Police then registered the offence at C.R. No.838/95 against the accused for the offence punishable under section 302, 381 and 201 of IPC.

5. The Police then drew panchanama of place of offence as well as the arrest panchanama. They also sent the dead body for postmortem. When accused was in the police custody he made a statement that he would point out the wooden log and the bed-sheet and accordingly the statement was recorded in the presence of panchas. Accused then took the police and panchas to the kitchen of the said hotel and from there he produced one wooden log which was in onion storage bin. He also produced one bed-sheet which was near from the said place. The Police attached the said articles under panchanama. They also attached clothes which were on the person of the accused and the Rexine bag and suit case and tape recorder which was found in the suitcase. The police also attached cash amount of Rs.3500/-from the pocket of the accused. The attached articles were sent to C.A. Police received the postmortem report wherein it was stated that there were four lacerated injuries on the person of Muttukumar and the cause of

death was shown as shock due to hemorrhage due to multiple injuries.

6. The police recorded the statements of various witnesses including Arun Pujari and taxi driver. After completion of the investigation Police submitted the charge sheet against the accused in the Court of Metropolitan Magistrate, Mumbai.

7. Finding that the accused was charge sheeted for the offence punishable under section 302 of IPC which was exclusively triable by the Court of Sessions, the learned Metropolitan Magistrate committed the case to Sessions Court, Mumbai.

8. The learned Sessions Judge, Mumbai framed charge Exh-1 against the accused for the offence mentioned above. The charge was read over and explained to the accused. Accused pleaded not guilty and claimed to be tried. His defence was of total denial.

9. In order to prove the guilt of the accused the prosecution examined as many as 11 witnesses consisting of :-

i) Complainant Anthony Xavier Exh.4

ii) PW 2 Barnabam Arokyaswami Exh.6

iii) PW 3 Suresh Chandrakumar Nadar, Exh.7

iv) PW 4 Vanraja Nadar, Exh.11,

v) PW 5 Raju Nadir, Exh.14,

vi) PW 6 Dr.Shivaji Kachare, Exh.16

vii) PW 7 Loknath Shetty, travel agent, Exh.19,

viii) PW 8 Arun Pujari, Exh.21

ix) PW 9 Suresh Kumman, Exh.23

x) PW 10 Sarjerao Kank, PSI, Exh.24

xi) PW 11 Shivdas Sonawane, PI Exh.26.

10. The Police also produced the complaint Exh.5, Inquest panchanama and panchanama of place of offence Exh.8, statement of accused and panchanama drawn regarding the discovery Exh.12 and 12A, panchanama of attachment of clothes of the accused Exh.15, postmortem notes Exh.17, ticket issued by the traveling agent Exh.20 and C.A. report Exh.28.

11. After considering the evidence adduced by the prosecution and hearing the arguments of both the learned Advocates the learned trial Judge came to the conclusion that the prosecution has proved beyond reasonable doubt that the accused committed murder of Muttukumar and he also committed theft of tape recorder

and cash amount which was in the counter of hotel. The trial Court also held the accused guilty of the offence punishable under section 201 of IPC and passed the above mentioned order of conviction and sentence.

12. Being aggrieved by the said judgment and order the accused has filed the present appeal. In this appeal before us Smt. Khemani, learned Advocate for the accused has urged only 3 points. Firstly, she submitted that learned trial court has not properly appreciated the evidence on record. Secondly, she canvassed before us that the learned Trial Judge ought to have considered the fact that there was no eye witness to the incident and possibility of murder being committed by someone else can not be ruled out. Lastly, she submitted that the circumstances brought on record by the prosecution do not complete the chain and point out that accused is guilty person. She, therefore, submitted that the appeal be allowed and the accused be acquitted.

13. As against this Smt. Bhosale, learned APP supported the judgement and order passed by the learned trial Judge She also submitted that there are various circumstances which clearly point out the guilt of the

accused. According to her the accused has also made extra judicial confession and there is no reason to discard the same. She, therefore, submitted that the appeal be dismissed.

14. It is prosecution case that on 1-9-1995 when PW 1 complainant Anthony Exh.4 went to his hotel the other waiter informed him that Barnawas Harijan told him that body of Muttukumar was lying in gutter at the passage between the hotel and kitchen. He has also stated that when he took out the body he found that Muttukumar was died. It has come on record that Police sent the dead body for post mortem and Dr.Kachare Exh.16 did the post mortem. At the time of postmortem following external injuries were found on the person of Muttukumar. The postmortem report is at Exh.17.

External injuries.

i. Lacerated wound at left frontal region 5 cm x 2 cm irregular in shape

ii. Lacerated wound at nasal bridge 2 cm x 1 cm;

iii. Deep lacerated wound at left temporal region 4 cm x 1 cm irregular in shape, and

iv. Lacerated wound at left occipital parietal region 1 cm x 2 cm irregular in shape.

Internal injuries :

i. hemorrhage in hand – under the scale and brain

ii. fracture of left temporo parietal region, larynx tracihea and bronchia.

15. The doctor has stated that case of death was hemorrhage due to multiple injuries. He has also stated that injuries were anti-mortem. Thus, from the evidence of Dr.Kachare it is quite clear that death of Mottukumar was homicidal.

16. The main and material question is whether the prosecution has proved beyond reasonable doubt that death of Mottukumar was caused at the hands of accused.

17. At the outset it must be mentioned that the prosecution case is based only on the circumstantial evidence. There is no rule of law that conviction cannot be passed only on circumstantial evidence. On the contrary there are various authoritative pronouncements in which it has been laid down that circumstantial evidence can be the basis of conviction if it is of such a character that it is wholly inconsistent with the innocence of the accused and is

consistent with the guilt of the accused. It has been so held in **IMG Agarwal V/s State of Maharashtra AIR 1963 SC 202.** It is also laid down in **Manmohan Singh V/s State of Punjab AIR 1977 SC 1173** that in a case of circumstantial evidence to be weighed against the accused must be clearly established and all such circumstances established beyond any doubt must form a complete chain which will unmistakably point out the guilt of the accused and excepting the guilt of the accused, no other conclusion can be reasonably drawn.

18. Bearing in mind the above mentioned well settled position of law,let us scan the evidence on record and find out whether the circumstances brought on record by the prosecution clearly point out the guilt of the accused. The prosecution has examined owner of the hotel where deceased as well as the accused were serving. PW 1 Anthony has stated that hotel Premier is owned by him and deceased was working in the said hotel as a manager while the accused was working as a cook and mainly he was preparing spices. He has categorically stated that deceased and accused used to stay in the hotel over night. Not only that but he has categorically stated that on the previous night i.e. On 31-8-1995 in the evening he had gone to the

hotel and at that time accused as well as the deceased were present in the hotel. According to Anthony on 1-9-1995 at about 6-00 a.m. Or so one waiter informed him that when he went to the hotel in the morning at that time door was open, cash counter was also open and manager i.e. deceased and the accused were not in the hotel. He, therefore, immediately went to the hotel and then he noticed the dead body of Muttukumar and when he made query with Arun Pujari who was conducting pan bidi shop and Suresh Kuman (PW 9) taxi driver told him that at about 5-30 a.m. the accused had inquired with them as to where from Banglore bus start and they had told him about the same. PW 9 has also stated that accused had made such query on 1-9-1995 early morning. This evidence is also not shaken or shattered in cross examination. Due weightage has to be given to the same. So, complainant thought that accused must have done the murder and he therefore immediately rushed towards Rupam theater where from Banglore buses used to start. He has also stated that at that time they went towards Rupam talkies and there they saw the accused. He was having one rexine bag and suit case with him. As soon as accused saw them he started running. They chased him and caught him and took him to the hotel. The complainant has specifically stated that when he made

query with accused as to what he did with Muttukumar the accused disclosed that he had quarrel with Muttukumar and as a result of the same he assaulted him with a wooden log used for cutting vegetables and Muttukumar died and he cleaned the place in the hotel by bed-sheet and threw the dead body in the gutter. Complainant therefore immediately informed to the police. Police came to the place of offence. Firstly, it must be noted that it is nowhere even specifically suggested to the complainant Anthony that Muttukumar and accused were not serving in his hotel. On the contrary the suggestion is to the effect that accused was not staying in the hotel over night. However, the said suggestion has been categorically denied by the complainant. PW 2 Barhaban has also stated that accused and deceased used to stay in the hotel. The evidence of the complainant is not at all shaken or shattered in the cross examination. It is not even suggested to the complainant that he had any grudge or grievance against the accused so as to implicate him falsely. No material omission or contradictions have been brought on record in his cross examination. The entire evidence of the complainant found to be reliable by the learned trial Judge. To us also the same appears to be quite trustworthy. There is no material

on record to show that the complainant wanted to protect the real culprit and hence he falsely named the accused. Merely because after seeing the dead body he first rushed towards Rupam Theater to find out the accused, we cannot jump to the conclusion that the said conduct is sufficient to discard his entire testimony. Had it been a case that the dead body was seen and he had not doubt about any particular person it would have been a different thing but when at that very juncture the complainant was informed that accused was making inquiry about buses going to Banglore and he has proceeded towards the said place the complainant thought it fit to catch the accused immediately. So, under such circumstances he proceeded to the said place and then immediately took the accused to the hotel and informed the police. So, under such circumstances there is no reason to raise any doubt about the credibility of this witness. Thus, from his evidence three important circumstances are brought on record by the prosecution.

19. The first circumstance which is established from the evidence of the complainant is that deceased and accused had stayed over night in the hotel in the question where the dead body of Muttukumar was found. The second circumstance is that practically immediately after the death of Muttukumar the accused disappeared from the said place and made an attempt to go to

Banglore. It must be noted that nothing has been brought in the cross examination of the complainant to show that accused had no intention to go to Banglore or that he had not disappeared from the hotel and gone to the bus stop. On the contrary PW 7 Shetty the travel agent has also stated that on that day in the morning

accused had come to his office and purchased one Banglore ticket. It is true that the said ticket was not found with accused when his searched was taken but that by itself is not sufficient to discard the evidence of complainant and the said witness.

20. Another important circumstance which is established from the evidence of the complainant is that accused made extra judicial confession before him. A feeble attempt has been made to show that the said extra judicial confession is not supported by the witness Arun Pujari because he has not stated anything about the said extra judicial confession. Firstly he must be noted that in the examination in chief the complainant has not specifically stated that when he made inquiry with the accused and accused disclosed that he assaulted Muttukumar and committed his murder, witness Arun Pujari was present their. When such is a the position we cannot jump to the conclusion that non disclosure of extra judicial confession by Arun Pujari is fatal to the prosecution.

The extra judicial confession in the instant case is a very important piece of evidence. It is true that generally an extra judicial confession is supposed to be a weak type of evidence. However, that does not mean that extra judicial confession has no value. In **Guru Sing V/s State of Rajasthan 2001 AIR (SC) 330** the Apex Court has observed “extra judicial confession, if true and voluntary, it can be relied upon by the Court to convict the accused for the conviction of the crime alleged ..... Despite inherent weakness of extra judicial confession as an item of evidence, it cannot be ignored, when shown that such confession was made before a person who has no reason to state falsely and to whom it is made in the circumstances which tend to support the statement”.

21. In fact there are various authoritative pronouncements in which the same view has been taken. Smt.Bhosale, learned APP has also drawn our attention to a case **State of Karnataka V/s M.N.Ramdas AIR 2002 SC 3109** wherein the extra judicial confession was made to a stranger who was not acquainted with the accused. It was made to a friend of prop. of a lodge where the accused had gone to stay during the relevant time. So, in a way it was not a very ordinary human conduct. Even

then it has been observed by the Apex court that when the evidence of person who has said that extra judicial confession is made before him appears to be trustworthy or his evidence is not sufficient to shake the creditability of the said witness, then such extra judicial confessional can be relied upon and more so when it is corroborated by other circumstantial evidence on record. So, having scrutinized the entire evidence on record we are of the considered view that there is absolutely no reason in the instant case to discard the extra judicial confession made by the accused. Here there is relation of master and servant between complainant and the accused. The extra judicial confession is supported by convincing circumstantial evidence.

22. We would presently point out various other circumstances on record which support the extra judicial confession and establish that accused is the guilty person. It is the prosecution case that soon after the incident when the accused was taken to the police station and his clothes were attached under panchnama Exh.15 it was noticed that there were some blood stains on his clothes. Similarly, at that time accused was having one suit case with him and in that

suit case the stolen property viz. Tape recorder which was missing from the place of hotel was found in the said bag of the accused. The prosecution has examined the panch witness Raja Nadar Exh.14. He has fully supported the contents of panchnama. So, there is no reason to disbelieve the said evidence. It has also come on record that clothes which were found on the person of the accused soon after the incident were sent to C.A. and C.A. vide his report Exh.28 has reported that blood of “A” group was found on the clothes of the accused. It is worth to note that blood group of deceased was also 'A'. The clothes of deceased were found containing blood of 'A' group. We also cannot ignore the fact that accused has not at all given any explanation as to why blood of “A” group was found on his clothes. It is worth to note that it is not even stated by the accused in his statement under Section 313 of Cr.P.C. that the said clothes did not belong to him. So, the finding of blood of 'A' group on the clothes of the accused which tallies with blood group of deceased is a very clinching circumstance which connects the accused with the crime.

23. Another very important piece of circumstance is that the property which was found to be missing from

the hotel was found with the accused soon after the murder. Complainant has stated that the said tape recorder is owned by him. There are various authoritative pronouncements in which it had been said that if the stolen property missing from the place of offence where the murder has taken place is found with the accused then the accused can be connected with the said murder. It must be noted here that in the instant case accused was found with the property within a short time from the murder. It is not his case that he is a receiver of the stolen property. It is not even suggested to prosecution witness nor it is stated in the statement under Section 313 of the case that the police planted the tape recorder in his suit case. So, the evidence with regard to the finding of stolen property with the accused also cannot be discarded and it also lends support to the prosecution evidence.

24. There is yet another piece of evidence which points out the finger towards the accused. The prosecution witness Vanraja Nadar Exh.11 has stated that when he was called in the Police station on 1-9-1995 the accused made a statement before police in presence of panchas that he would point out the wooden log and bed sheet and accordingly police drew

memorandum and then accused led police and panchas to the said hotel and from the kitchen he produced one wooden log used for cutting the onions from the storage bin of onion and he also produced one bed sheet which was near from the said place in the kitchen. The evidence of this witness is also not shaken or shattered in the cross examination. It is true that there appears to be little discrepancy as to from which bin wooden log was produced. Whether it was from the storage bin of onions or from the dust bin. However, the fact remains that the accused had made a statement before Police that he would point out the wooden log and bed sheet and accordingly he took the police to the said kitchen and then produced articles. The minor discrepancy with regard to the nature of bin cannot be given much weightage particularly when there is nothing on record to show that place where from the log and bed sheet were produced were easily visible to anyone and there is in fact no discovery as contemplated by Section 27 of the Evidence Act, 1872. We cannot ignore he fact that basic idea embodied in Section 27 of the Evidence Act is a doctrine of confirmation by subsequence events. The doctrine is founded on the principle that if any fact is discovered in search made on the strength of any information

obtained from accused such discovery is a guarantee that the information supplied by the prisoner is true, the information might be confession or information inculpable in nature. If it results in discovery of a fact it becomes a reliable information. It has been so observed in a case **State of Maharashtra V/s Damu 2000 AIR (SC) 1691.** Thus, if we bear in mind the above position of law and see the evidence with regard to recovery of the wooden log and bed-sheet then we find that evidence in that behalf is quite cogent and consistent and there is no reason to disbelieve the panch witness Wanraja Nadar Exh.11 and the investigating officer in this behalf and from their evidence it is very clear that incriminating articles were discovered at the instance of accused. Not only that but it is also established from Exh.28 CA report that blood of “A” group was also found on the wooden log and there was human blood on the bed sheet. This evidence also strengthen the prosecution case.

25. Incidently, it must be noted here that in the instant case the FIR is also lodged by the complainant within short time. The prompt lodging of FIR in which name of accused is disclosed also lends support to the prosecution version. The accused is in fact traced

immediately after the incident and as mentioned above blood stained clothes were found on his person.

26. Thus, following circumstances viz,

a) complainant noticed accused and deceased on the previous night in the hotel;

b) Deceased and accused staying in the hotel over night;

c) Immediately after the commission of offence accused trying to disappear and making an attempt to go to Banglore without informing his master;

d) extra judicial Confession made by the accused before his master i.e. Complainant Anthony;

e) Discovery of log used in the commission of offence at the instance of the accused and finding blood of A Group on the said articles which tallies with the blood group of deceased;

f) Finding of blood of 'A' group on the clothes which were on the person of the accused soon after the incident which blood group tallies with blood group of deceased;

g) finding of stolen property which was kept at the place of offence with the accused soon after the incident, taken together.

in our considered view certainly establish the guilt of accused. The learned trial Judge who had an opportunity to see the witnesses while deposing has considered the entire evidence in its proper perspective and rightly held that the circumstantial evidence in the instant case clearly establishes the guilt of the accused. Thus, there is no substance in the appeal. Hence we pass the following order :

1. The Criminal Appeal No.217 of 2000 is dismissed.

2. Order of conviction and sentence passed by the trial Court is confirmed.

3. Fee of appointed advocate is quantified to Rs.1,000/-.

(S.R.SATHE,J.) (S.B.MHASE,J.)